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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 393

PHOENIX ASSURANCE COMPANY OF NEW YORK,
Petitioner,

vs.

CITY OF BUCKNER, MISSOURI, BYRON B. CRAIL AND HOUSING AND HOME FINANCE ADMINISTRATOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Phoenix Assurance Company of New York prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on July 18, 1962.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court is unreported and is printed in the certified transcript in the printed record below (R. 181-193). The opinion of the United States Court of Appeals for the Eighth Circuit is printed in Appendix A hereto, *infra*, p. A1; and is reported in ..... F.2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on July 18, 1962, Appendix B, *infra*, page A9. An order staying issuance of the mandate of the Court of Appeals was entered on August 2, 1962, staying the mandate for a period of thirty days from and after August 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED.

1. Whether the Housing and Home Finance Administrator, authorized by Congress to sue or be sued, can be sued in the State of Missouri where he is doing business or is jurisdiction over him limited to where he can be personally served with process?

2. Whether the Housing and Home Finance Administrator can be sued in the State of Missouri if he is doing business there, but not personally served with process, and if he can be sued there is he responsible for losses that he caused by his regulaions while claiming to act as only a lender of Government funds?

3. Whether the petitioner, a corporate surety, is relieved of its obligations under a performance bond on an original contract for the losses that occurred when the Housing and Home Finance Administrator, as a condition of lending public finds, required the City, as borrower, and its contractor to enter into a new contract on Housing and Home Finance Administrator's forms and to agree to new conditions for the performance of the original contract?

STATUTES INVOLVED.

The statutory provisions involved are

42 U.S.C. 1494 (August 11, 1955, c. 783, Title II. Section 204, 69 Stat. 644),

28 U.S.C. 2679 (June 25, 1948, c. 646, 62 Stat. 984),

12 U.S.C. 1749a (April 20, 1950, c. 94, Title IV, § 402, 64 Stat. 78; 1953 Reorg. Plan No. 1, § 5, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631), and

they are printed in Appendix C, *infra*, p. A10.

STATEMENT.

The petitioner, Phoenix Assurance Company of New York, filed a complaint for declaratory relief in the United States District Court for the Western District of Missouri, against the City of Buckner, Missouri, its contractor, William R. Reser, and the Housing and Home Finance Administrator, to determine petitioner's rights and liabilities under a performance bond in the amount of $97,036.85 that it had issued on the original contract between the City and its contractor to construct a sewer (R. 7, 23). The jurisdiction of the district court was invoked because of diversity of citizenship, the petitioner being a New York

corporation and the defendant City a Missouri municipal corporation and the individual defendants were citizens of Missouri; the Housing and Home Finance Administrator was either a federal "corporation" or "agency" or individual. The HHFA attorney said he "resembles an executive department" in his brief in the Court of Appeals.

At the conclusion of the trial in the District Court the HHFA's motion to dismiss (R. 55) on the grounds that Administrator was not personally served in Missouri, or that his employee was not authorized to accept service in Missouri was sustained (R. 5, 185).

After the original contract was made the City did not have funds to proceed with the contract (R. 9, 28, 49) and the HHFA agreed to lend the City $150,000.00 of public funds (R. 72, 84, 141) and as a condition of the loan required the City and its contractor to comply with numerous terms and conditions imposed by the HHFA (R. 85-91, 105-108, 131-139) including the execution of a new contract on the forms of the HHFA.

The HHFA requested a new performance bond on the new contract and the petitioner refused to execute a new bond (R. 33, 44).

Notwithstanding the fact that the City had no funds to perform the contract, the HHFA authorized the City to serve notice on the contractor to proceed with the project (R. 182) although the contractor could not meet his financial obligations (R. 159) and later abandoned the project and thereby caused a loss to the City. The City counterclaimed for the loss and the District Court entered judgment for the City against the petitioner in the amount of $30,180.73 on the theory that petitioner was bound on its bond on the original contract (R. 181).

The petitioner alleged that the HHFA, by requiring the City and its contractor to make a new contract, abrogated and rescinded the original contract and thereby relieved the petitioner-surety of any obligation under its bond; the petitioner also claimed that the HHFA was responsible for the loss that occurred because of his order to proceed with the contract when he knew the contractor was financially unable to perform and a loss would occur.

The Court of Appeals did not decide whether or not the HHFA was properly served but assumed he was and found "his relation to the City was only that of a lender of Government funds and a purchaser of the City's Revenue Bonds" and held the dismissal by the District Court was proper (opinion p. 8, Appendix A, *infra*, p. A8).

The Court of Appeals disposed of petitioner's claim against HHFA, without citation of authority, by stating:

> "The contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator (sic) has too inadequate a base to merit discussion." (Opinion, p. 8, Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals in affirming the dismissal of the petitioner's complaint as to the HHFA is in direct conflict with this Court's holding in principle that "* * * when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under like circumstances would be * * *." *Federal Housing Administration, Region No. 4* v. *Burr*, 309 U.S. 242, because the dismissal was based on the erroneous conclusion that even if the HHFA was doing business in Missouri, he

could not be sued there because he was not personally served there.

If the Court of Appeals' holding is the law, then a Federal Administrator can act with impunity in any jurisdiction and can only be sued where he is served personally. Such a holding is directly in conflict with this Court's interpretation of the intent of Congress in using the words "sue and be sued."

2. The question of where a federal administrator may be sued is an important question of federal law which has not been, but should be, settled by this Court. The *Burr* case, *supra*, would indicate that an administrator, since he can "sue and be sued" could be sued anywhere he is doing business, as any other corporation, but the HHFA along with most federal administrators are not corporations as such, and this Court did not decide that specific point in the *Burr* case.

If the Court of Appeals' holding below is correct, then all claimants must sue a federal administrator where he can be served personally which could not be the intent of Congress in enacting the legislation.

3. The decision of the Court of Appeals below is in conflict with the decision of the Court of Appeals for the Second Circuit in the case of *Gart* v. *Cole*, C.A. N.Y., 263 F.2d 244, 249, Cert. Den. 359 U.S. 978; wherein the Second Circuit held that service of process upon the administrator should be determined as in suits against corporations. It noted that, as this Court did in *Snyder* v. *Buck*, 340 U.S. 15, 22, that the determination of the proper party defendant to challenge the action of an administrator is "compounded of confusion and artificialities." The Second Circuit held that the service on the Administrator at his New York office, although not personal service, was

sufficient. The Court below, by affirming the district court, held the service in this case was insufficient because personal service was not had on the Administrator.

The HHFA is the head of a federal agency but exactly what type of legal entity he is, is not clear, except he can sue or be sued. It would appear from the holding of the *Burr* case, *supra,* and the *Gart* case, *supra,* that he can be sued as a corporation, and under the principle of those cases the court below erred in affirming the district court's dismissal on the grounds that the HHFA was not properly served with process.

4. The mere fact that the HHFA lent the City the money to proceed with the project should not relieve him of his responsibility for the losses that occurred due to the City's actions and his engineer's actions in following his regulations. Congress, in granting him his powers, also granted him the liability to be sued without restriction. The court below erroneously allowed him to escape his responsibility on the theory that he was only a money lender. In this case he was more than just a money lender—he controlled the project by his regulations (R. 85-92; 105-108) and the petitioner never agreed to his regulations and should not be held liable for the losses caused by him. *State* v. *Malvaney*, 221 Miss. 190, 72 So.2d 424 (1954); *Peerless Insurance Co.* v. *Cerny & Associates, Inc.*, U.S.D.C. Minn. 199 F. Supp. 951 (1961).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16,901.

Phoenix Assurance Company of New York,

Appellant,

vs.

City of Buckner, Missouri, Byron B. Crail and Housing and Home Finance Administrator,

Appellees.

Appeal from the United States District Court for the Western District of Missouri.

[July 18, 1962.]

Before Sanborn, Blackmun and Ridge, Circuit Judges.

Sanborn, Circuit Judge.

This is an appeal from a judgment for the defendants in a diversity action brought by Phoenix Assurance Company of New York to obtain a judgment declaring void a performance bond issued by it on April 19, 1956, to protect the City of Buckner, Missouri, against default in the completion of a contract it had entered into on March 30, 1956, with William A. Reser, doing business as Continental Construction Company.

The contract called for the construction of a sewer system for the City at a cost of $97,036.35. By the terms of the contract, work was to commence at a date to be specified by the City in a written notice to proceed, de-

livered to the contractor, and was to be completed within 300 days thereafter; the contractor was to "pay the prevailing wage rates in this district, pertaining to the trade," and to furnish a performance bond in an amount equal to the contract price, for the faithful carrying out of the contract and the payment of all persons performing labor or furnishing materials.

Reser procured the performance bond from Phoenix by paying a premium of $970.37, in consideration of which Phoenix agreed to indemnify the City for any default by Reser in the performance of his contract. The bond contained the following provision:

> "PROVIDED FURTHER, That the said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the contract, or the work to be performed thereunder or in the specifications accompanying the same, shall in any wise affect its obligation on this bond and it does hereby waive notice of any change, extension of time, alteration, or addition to the terms of the contract, or to the work, or to the specifications."

On March 16, 1956, before entering into its contract with Reser, the City had made written application to the Housing and Home Finance Agency at Fort Worth, Texas, requesting the Agency to purchase $150,000 General Revenue Bonds theretofore voted by the City for the purpose of constructing the sewer system. The application was accepted by the Agency on July 11, 1956, and an offer to lend the City not to exceed $150,000 for the project was made on July 18, 1956, by "United States of America, Housing and Home Finance Agency, Community Facilities Commissioner, Regional Administrator." The offer was accepted by the City on August 2, 1956. The loan agree-

ment between the Agency and the City was subject to various terms and conditions imposed by the Agency, including the furnishing of copies of various documents, such as ordinances authorizing the issuance of the bonds, instruments relating to the proposed project, data as to all proposed wage rates, and such other data as "the Government may require." It was provided that the Government should not be obligated to the City if it proceeded with the project without having been first advised by the Housing and Home Finance Administrator that the documents furnished were in compliance with the conditions of the offer.

It was not until February 21, 1957, that the Agency advised the City that deficiencies in required paper work furnished by it had been corrected and that it was authorized to issue a notice to Reser to proceed with the work. Notice to proceed was given to Reser on February 23, 1957, specifying February 25, 1957, as the commencement date, and December 30, 1957, as the completion date. Work on the project apparently actually began on April 26, 1957. No funds were made available to the City until April 24, 1957, when an advance of $67,630.68 was authorized by the Agency pending delivery of the City's Revenue Bonds. The advance was conditioned upon the procurement of a new performance bond or the furnishing of an opinion by the City Attorney that the bond of Phoenix was a valid and binding obligation. The advance was actually made on June 18, 1957.

The controversy as to the liability of Phoenix as surety on its performance bond in suit arose late in 1956. Phoenix had declined a request to rewrite the bond on a standard form of the Housing and Home Finance Agency. The Administrator of that Agency had been advised on December 14, 1956, by counsel for Phoenix that it considered that it

had "executed no bonds for the performance of any alleged contract between the City of Buckner, Missouri, and William Reser d/b/a the Continental Construction Company." The City contended that the bond in suit was valid and binding, and so advised Phoenix and the Administrator.

Reser—who, in the performance of his contract, was employing union labor and paying union wages—had a dispute with the union and "quit the job." The City, under date of September 26, 1957, gave notice of default to Reser. Notice of termination of his contract was dated October 23, 1957. The City, by letter of that date, requested Phoenix to take over and complete Reser's contract, which it did not do.

The grounds for asking that the bond in suit be declared void are summarized in the amended complaint of Phoenix (naming as a party defendant the "Housing and Home Finance Administrator, 2511 Federal Office Building, Kansas City, Missouri") as follows:

> "That because of the City's inability to perform the contract at the time of making; its unreasonable delay in notifying the defendant Reser to proceed on the contract for over eleven months; the defendant Reser's assignments to creditors; and the substantial change in the prices of materials, labor and supplies; the Housing and Home Finance Administrator's contract CFA 11-55-K was a new contract that abrogated the terms of the original contract [between the City and Reser] and thereby relieved the plaintiff surety of any obligation on the original bond; the plaintiff surety executed no bonds for the Housing and Home Finance Administrator; the original contract was rescinded by the execution of the new Housing and Home Finance Administrator's contract; the original contract has been breached by the City and the Housing and Home Finance Administrator and the plaintiff's bond is null and void."

The City asserted that the bond was valid, and counterclaimed for damages of $35,472.53, allegedly caused by Reser's default.

Byron B. Crail, who had rendered services to Reser in connection with his partial performance of the sewer contract, for which Crail had not been paid by Reser, intervened and filed a counterclaim.

The Housing and Home Finance Administrator denied the allegations of the amended complaint, and asserted that he had not properly been served with summons and had no real interest in the outcome of the litigation. He asked that as to him the amended complaint be dismissed.

The action was tried to the District Court without a jury. The court determined (1) that the bond was valid; (2) that the City was entitled to recover $30,180.73 from Phoenix, and that Reser was liable to Phoenix for that amount; (3) that Crail was entitled to recover from Phoenix and Reser $1,355.05, with Reser liable to Phoenix therefor; (4) that no statutory penalty or attorney's fees against Phoenix should be allowed; and (5) that the action as against the Housing and Home Finance Administrator be dismissed. From the ensuing judgment, this appeal was taken.

The judgment is necessarily based upon a determination by the District Court that, under applicable Missouri law, the performance bond in suit was and continued to be a valid obligation—despite the facts (1) that at the time the City contracted with Reser it did not have sufficient funds to complete the project; (2) that the City was unable for nearly eleven months to give Reser notice to proceed with the work; (3) that, in order to obtain the necessary funds from the Housing and Home Finance Agency to carry out the project, it was necessary for the City to conform to certain requirements not specified in its con-

tract of March 30, 1956, with Reser; and (4) that Reser was in financial difficulties growing out of other construction contracts at the time he was notified to proceed.

The judgment represents the prediction or forecast of an experienced Missouri federal trial judge as to what the Supreme Court of that state would probably hold, were it called upon to decide a similar case. *Homolla* v. *Gluck*, 8 Cir., 248 F.2d 731, 734. Unless it is demonstrable that his conclusion was not a permissible one because induced by a clear misconception or misapplication of Missouri law, there can be no reversal. *Burkhardt* v. *Bates*, 8 Cir., 296 F.2d 315, 316 and cases cited. The burden of demonstration is on the appellant and is a heavy one. *Western Casualty & Surety Co.* v. *Coleman*, 8 Cir., 186 F.2d 40, 43; *Village of Brooten* v. *Cudahy Packing Company*, 8 Cir., 291 F.2d 284, 288-289.

Phoenix was a compensated surety. "One who engages in the business of insurance for compensation may properly be held more rigidly to his obligation to indemnify the insured than one whose suretyship is an undertaking uncompensated and casual." *Chapman* v. *Hoage*, 296 U.S. 526, 531; *State ex rel. Hardy* v. *Farris*, 226 Mo. App. 1007, 1014, 47 S.W.2d 198, 201. See, also, 50 Am. Jur., Suretyship, §§ 320, 321.

There is no merit in the contention of Phoenix that because the City did not, at the time it contracted with Reser for the construction of the sewer system, have the funds on hand to complete the project, the performance bond in suit was invalid. The City, in order to finance the project, had authorized the issuance of bonds, and had applied to the Housing and Home Finance Agency for their purchase. Neither Reser nor his surety could have had any illusions about how the project was to be financed or could have believed that it was to be an immediate "cash and

carry" operation. Moreover, if the performance bond was invalid at the time of its execution, a return or tender back of the completely unearned premium would be a prerequisite to the maintenance of this action. *Goffe* v. *National Surety Co.*, 321 Mo. 140, 150-151, 9 S.W.2d 929, 933.

Phoenix contends that it was materially prejudiced by the long delay of the City in giving notice to Reser to proceed with the work—this because prices of material and labor had increased substantially in the interval, thus imposing upon Phoenix a greater risk than it was originally intended to bear—and that the provision in the bond that no change, extension of time, alteration or addition to the terms of Reser's contract should affect the obligation of the surety, is, for some reason, not apparent to us, inapplicable under the facts of this case.

The general rule relative to extension of time is stated in 50 Am. Jur., Suretyship, § 322, as follows:

> "In accordance with the rule that a surety company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance, it is held that an extension of time will not relieve a surety company on a bond unless the extension exceeds the time limited in the bond for bringing suit thereon, or unless the surety company is thereby made to suffer material harm; and that there will be no presumption of injury unless injury is alleged and proved."

See, also, *State ex rel. Hardy* v. *Farris, supra*, pages 1013-1014 of 226 Mo. App., pages 200-201 of 47 S.W.2d; *Higgins & Coufal* v. *Massachusetts Bonding & Insurance Co.*, D.C. Neb., 112 F. Supp. 390, 393. It was the obligation of Phoenix to protect the City from any default by Reser in the performance of his contract, and not the obligation of the City to protect Phoenix against loss on account of

its assumption of a risk for which it was paid and which turned out badly because of Reser's lack of financial responsibility, and inability to complete his undertaking.

While it cannot, of course, be said with certainty that the Supreme Court of Missouri would agree with the result reached by the trial judge, the question whether the performance bond in suit was invalidated, under Missouri law, for any of the reasons given by Phoenix is one of those doubtful and debatable questions of local law as to which this Court is justified in accepting, and will accept, the views of the trial judge. See *National Bellas Hess, Inc.*, v. *Kalis*, 8 Cir., 191 F.2d 739, 741, cert. denied 342 U.S. 933.

The contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator has too inadequate a base to merit discussion. Assuming that he was properly served with process, his relation to the City was only that of a lender of Government funds and a purchaser of the City's Revenue Bonds. The claim against him was properly dismissed.

As to damages, we think that the amount determined by the trial judge is not without sufficient evidentiary support.

We find in the record on appeal no warrant for holding that the trial judge either misconceived or misapplied applicable Missouri law in entering the judgment appealed from. Cf. *Phoenix Assurance Company of New York* v. *Appleton City*, 8 Cir., 296 F.2d 787.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B.

Judgment.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16,901. September Term, 1961.

Phoenix Assurance Company of New York,
Appellant,

vs.

City of Buckner, Missouri, Byron B. Crail and Housing and Home Finance Administrator.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

July 18, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX C.

Statutes.

42 U.S.C. § 1494. Functions, powers and duties of Administrator; administrative expenses.

In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator shall (in addition to any authority otherwise vested in him) have the functions, powers, and duties set forth in section 1749a of Title 12, except subsection (c) (2) of such section. Aug. 11, 1955, c. 783, Title II, § 204, 69 Stat. 644.

28 U.S.C. § 2679. Exclusiveness of remedy.

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive. June 25, 1948, c. 646, 62 Stat. 984.

28 U.S.C. § 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(h) Any claim arising out of * * * interference with contract rights. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444.

12 U.S.C. § 1749a. Powers and duties of Administrator—Preparation and submission of budget; maintenance of accounts.

(c) In the performance of, and with respect to, the functions, powers, and duties vested in him by this subchapter, the Administrator, notwithstanding the provisions of any other law, may—

(3) sue and be sued; . . . Apr. 20, 1950, c. 94, Title IV, § 402, 64 Stat. 78; 1953 Reorg. Plan No. 1, § 5, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 393

PHOENIX ASSURANCE COMPANY OF NEW YORK,
PETITIONER

v.

CITY OF BUCKNER, MISSOURI, BYRON B. CRAIL and HOUSING AND HOME FINANCE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT HOUSING AND HOME FINANCE ADMINISTRATOR IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 181-193)[1] is unreported. The opinion of the Court of Appeals (Pet. App. A, pp. A1-A8) is as yet unreported.

[1] "R." references are to the printed record filed by petitioner in the Court of Appeals which has been filed by the petitioner in this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1962. The petition for a writ of certiorari was filed on August 31, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, there is any basis for the imposition of liability on the Housing and Home Finance Administrator.

STATEMENT

This action was brought by petitioner against the City of Buckner, Missouri, the Housing and Home Finance Administrator, and William A. Reser, seeking a declaratory judgment that a performance bond executed by petitioner was void. In the alternative, judgment was sought against the Housing and Home Finance Administrator for any loss sustained by petitioner in discharging its obligation on the bond.

On March 30, 1956, the City of Buckner entered into a contract with William A. Reser for the construction of a sewer system (R. 113). The contract provided that work on the project was to commence at a date specified by the City in a written notice to proceed, which was to be delivered to Reser. On April 19, 1956, petitioner issued a performance bond under which it became bound to the City of Buckner for any default by Reser (R. 111).

On March 16, 1956, the City of Buckner made

formal application to the Housing and Home Finance Agency (HHFA) requesting the agency to purchase $150,000 worth of General Revenue bonds that had been voted by the city council for the construction of the sewer system (R. 74). An offer to lend the City $150,000 for the project was made on July 18, 1956 (R. 84), expressly conditioned on the City's compliance with various terms and conditions imposed by the agency (R. 85-91).

A dispute as to petitioner's liability on its performance bond arose in 1956 after HHFA had requested the City to have petitioner execute a new bond on a standard agency form (R. 132, 136). On December 14, 1956, petitioner informed HHFA that it no longer considered itself to be liable on the bond (R. 108). On January 2, 1957, in response to a letter from HHFA enclosing a copy of petitioner's letter of December 14, 1960, and suggesting that the dispute be settled "immediately" (R. 150), the City's attorney advised petitioner that it still considered the bond valid and enforceable (R. 71). In a response on March 29, 1957, petitioner notified the City that it would "* * * not be bound by the bond * * *" (R. 109).

On February 21, 1957, HHFA had authorized the City to issue a notice to proceed to Reser (R. 58), which was done on February 23, 1957 (R. 128). Work on the project actually started on April 26, 1957. From time to time during the course of work on the project, an HHFA engineer, Sonnenberg, certified payments to the Contractor for completed work, which enabled the City to draw HHFA funds for the

payments (R. 179-180). Work proceeded without apparent difficulty until some time later in 1957 when, because of a labor dispute, Reser abandoned the project (R. 162-163, 180-181). On September 23, 1957, the City notified the Contractor of its intention to terminate the contract and complete the project at the Contractor's or surety's expense (R. 67-68). A similar notice was sent to petitioner on September 26, 1957 (R. 68).

This action was commenced on April 5, 1957 (R. 1). In its original complaint (R. 7-9) petitioner alleged that the contract between Reser and the City of Buckner had been breached by the City and that its bond was, therefore, null and void (R. 8). The City counterclaimed on April 24, 1958, for damages that it alleged arose from Reser's failure to complete the project (R. 18).

On May 21, 1959, petitioner filed its "First Amended Complaint", adding the respondent Housing and Home Finance Administrator as a party defendant (R. 23-27). To the allegations of the original complaint was added the assertion that a new contract, required by the Housing and Home Finance Administrator, had been entered into by the City and Reser and that since this rescinded the original contract, petitioner was relieved of any obligation under its bond (R. 23-27). It was further alleged that the Administrator was responsible for any loss because he "notified the City to issue a notice to proceed to Reser when he knew that Reser was financially unable to perform the contract and that a loss would occur." (R. 25.)

On July 23, 1959, the Administrator filed a motion to dismiss the complaint on the ground that there had been no proper service of process upon him and that he was not a necessary party to the action since he had no interest in its outcome (R. 3). On August 5, the district court denied the motion but ordered the purported service quashed (R. 3). Petitioner moved to set aside the order quashing service on August 21, 1959, which motion was granted by the court on September 9, 1959 (R. 3). On December 19, 1960, after the close of petitioner's case, the Administrator moved to dismiss the complaint on the same grounds stated in his earlier motion of July 23, 1959 (R. 4, 55, 56). The court granted the motion on the same date (R. 4). No formal order dismissing the complaint was entered by the court until the conclusion of the trial on petitioner's claim against the other defendants. On August 18, 1961, the district court ordered (R. 5):

> That Housing and Home Finance Administrator have judgment against the plaintiff on plaintiff's complaint.

The district court held that the bond was valid and entered a judgment in the amount of $30,180.73 in favor of the City of Buckner and a judgment in the amount of $31,535.78 in favor of petitioner against defendant William A. Reser (R. 5-6).

The Court of Appeals affirmed. As to petitioner's claim against the Housing and Home Finance Administrator it held (Pet. App. A 8):

The contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator has too inadequate a base to merit discussion. Assuming that he was properly served with process, his relation to the City was only that of a lender of Government funds and a purchaser of the City's Revenue Bonds. The claim against him was properly dismissed.

ARGUMENT

Petitioner's assertions that the decision below is in conflict with this Court's decision in *Federal Housing Administration* v. *Burr*, 309 U.S. 242, and with the decision of the Court of Appeals for the Second Circuit in *Gart* v. *Cole*, 263 F. 2d 244, and that it presents an important question of federal law, are all bottomed on the assumption that the question the Court of Appeals decided was that "* * * even if the [Administrator] was doing business in Missouri, he could not be sued there because he was not personally served there." (Pet. 5-6.) The Court of Appeals, however, as recognized by petitioner in its Statement (Pet. 5), expressly declined to pass on the adequacy of the attempted service on the Administrator (Pet. App. A8), and rested its decision on the patently frivolous nature of petitioner's claim.

Petitioner, here, has not attempted to spell out any theory of liability on the part of the Administrator. In any event, the court below was clearly correct in its conclusion that petitioner's claim against the Administrator is completely without merit. The only

connection the Housing and Home Finance Agency had with the subject project was that it supplied the necessary funds for it to the City of Buckner. The fact that the City's use of these funds was conditioned on the City's meeting certain requirements of the Agency had nothing to do with petitioner's liability on its performance bond.

In the court below, petitioner urged that the Administrator was responsible for the loss that occurred because he negligently ordered work on the project to proceed when he knew that the Contractor was in financial difficulties. What petitioner suggested was that it could transfer its liability on the performance bond to the Administrator because, at the time the Administrator ordered work on the project to proceed, he knew the Contractor would not be able to complete performance.[7] But petitioner was paid to assume the risk that, because of financial or other difficulties, the Contractor would not timely complete the work. The Administrator, of course, did not create the Contractor's financial predicament. Merely because he allegedly knew of these difficulties is no reason why petitioner should be permitted to transfer the burden of its contractual obligation to him.[8]

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[7] It should be noted that, contrary to petitioner's assertion below, the record shows that the Administrator never "ordered" work on the project to proceed.

[8] Moreover, since the claim sounds in tort, the courts below had no jurisdiction to entertain the suit against the Administrator. Under 28 U.S.C. 2679, it could only be brought against the United States and not against a federal agency, *eo nomine*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 393

PHOENIX ASSURANCE COMPANY OF NEW YORK,
Petitioner,

vs.

CITY OF BUCKNER, MISSOURI, BYRON B. CRAIL AND HOUSING AND HOME FINANCE ADMINISTRATOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

and

MOTION OF RESPONDENT CITY OF BUCKNER TO ASSESS DAMAGES UNDER RULE 56(4)

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STATEMENT

To correct an inaccuracy, not only in the statement of the case contained in the petition, but also in the "reasons for granting the writ" Respondent City of Buckner points to the fact that the motion to dismiss filed by HHFA (R. 55, 56) states as a ground (Para. 4) that the Administrator is not a necessary party to the action since he has no real interest in the outcome of the litigation as between the plaintiff, the City of Buckner, and the other defendants. Petitioner did not bring up the record to show

what happened to this motion. The answer filed by the Administrator on September 18, 1959 (R. 28, 29, 30), contains the same allegation (Para. 29) as contained in paragraph 4 of the motion to dismiss. The District Court in the memorandum opinion (R. 185) says that at the close of all the evidence the court sustained a motion to dismiss as to the Housing and Home Financing Agency.

The Court of Appeals in its opinion (Petition for Writ of Certiorari A8) passed on the legal liability of the Administrator upon the assumption that he was properly in court and held that his relationship to the City was only that of a lender of Government funds and a purchaser of the City revenue bonds and further that the claim against him was properly dismissed.

ARGUMENT

Countering Petitioner's Reasons for Granting the Writ.

First Reason: The first reason erroneously states that the Court of Appeals affirmed the dismissal as to HHFA because the dismissal was based on the erroneous conclusion that even if the HHFA was doing business in Missouri he could not be sued there and because he was not properly served there.

Reference to the opinion of the Court of Appeals (Petition for Writ A8) does not support petitioner's statement. Also reference to the District Court's opinion (R. 185) impels the conclusion that the motion of the Administrator to dismiss was sustained at the conclusion of all of the evidence and it must have been upon the ground that it was not shown that the Administrator had any interest in the transaction.

Second Reason: The second reason is based upon the false premise that the Court of Appeals held that the Administrator was not properly before the Court and was not properly served. The answer to this question is the same as to first reason.

Third Reason: The third reason is likewise based upon the false premise that the Court of Appeals held that the service on the Administrator was insufficient. Neither the District Court nor the Court of Appeals so held. This fact is supported by the opinion of the Court of Appeals (Petition for Certiorari A8) and by reference to the Administrator's answer, motion to dismiss and finally by the dismissal of the Administrator at the conclusion of all the evidence (R. 185).

Fourth Reason: The fourth reason is in fact a claim of error on the part of the Court of Appeals in its conclusion that no case was made against the Administrator. This reason is not even remotely related to those "special and important reasons" to which reference is made in Rule 19(1) and (1)(b).

This Court, in *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, l.c. 502, said

> "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Also, in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, the Court said:

> "But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

The language of the Court of Appeals is pertinent. "The contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator has too inadequate a base to merit discussion."

Further, in the statement of the third question of "questions presented" petitioner's position is that a new contract had been entered into between the City and the contractor. The District Court (R. 187) found:

> "It is plaintiff's contention that the City and the defendant Reser entered into a new contract at the time the loan was accepted. Reser seems to have some faint recollection that he signed such an agreement. However, I am unable to find any documents any place in the record containing any such new agreement, and it must be my conclusion that there was no such new agreement ever executed, and that the surety company had no obligation beyond that imposed upon it under the terms and provisions of the original contract."

The petition should be denied.

Respectfully submitted,

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MOTION OF RESPONDENT CITY OF BUCKNER TO ASSESS DAMAGES UNDER RULE 56(4)

The respondent City of Buckner moves the Court to adjudge, to the respondent City of Buckner, reasonable damages because it clearly appears from the petition for writ of certiorari that there is no ground for granting such a writ. The petition for writ in this case is utterly groundless. Petitioner has not pointed to a single case decided by this Court, any of the Courts of Appeals, or the Missouri courts with which the opinion of the Court of Appeals in this case conflicts. The questions raised, in petitioner's "reasons for granting the writ", as to whether the HHFA is amenable to suit, where venue of such a suit lies, and how service of process must be had upon the Administrator, were not even reached by the Court of Appeals which, in its decision affirming the judgment of the District Court, assumed that the Administrator was properly served with process (Petition, A8).

The respondent City of Buckner, therefore, moves the Court to assess a penalty against petitioner and in favor of the City of Buckner in accordance with Rule 56 in the amount of 10% of the judgment or such sum as the Court may deem appropriate.

Respectfully submitted,

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